Under the Pennsylvania statute the fines for operating overloaded vehicles within local municipalities were required to be paid to and used by such local municipality for the construction, repair and maintenance of its highways (132a, 75 P. S. § 737).

Imprisonment of the driver of a Pennsylvania overweight vehicle was provided for only upon default in payment of the fine. None of the petitioner's drivers was ever imprisoned, had his license suspended or was subjected by the Pennsylvania authorities charged with enforcing the overweight provision to any sanction other than the fine, and this was true for the employee-drivers of the other carriers (128a, 75 P. S. § 453).

During the years of World War II and up to the latter part of 1950, petitioner's overweight vehicles were not stopped and fined by the Pennsylvania enforcement authorities (129a).

The Pennsylvania statute provided for removal of the excess load in the discretion of the enforcement authorities before the overweight vehicle could continue enroute, but neither the petitioner nor the other carriers was ever required to remove any excess load before its overweight vehicle was permitted to continue on the Pennsylvania highways. In some instances the other states did enforce a similar type removal provision (44a-45a, 82a, 129a, 75 P. S. § 454).

No sanctions were imposed by Pennsylvania on the petitioner or the other carriers in 1951 for operating the overloaded equipment, other than by way of the fines imposed on the employee-drivers (129a).

It was the practice of motor carriers subject to the jurisdiction of either the Interstate Commerce Commission or the Pennsylvania Public Utility Commission to include in their books, records and reports, fines for overloaded motor vehicles in an operating expense account sub-titled "Fines for Traffic Violations", and not in a non-operating expense account covering "Penalties and Fines for Viola-

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JOHN T. FEY, Clerk

IN THE

# Supreme Court of the United States

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October Term, 195~~6~~7

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No. [redacted] 109

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TANK TRUCK RENTALS, INC.,

*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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LEONARD SARNER,
PAUL A. WOLKIN,
208 Transportation Center Building,
Philadelphia 3, Pa.,
*Counsel for Petitioner.*

tions of Law, except Fines for Traffic Violations". These accounts were prescribed by the Uniform System of Accounts promulgated by the I. C. C. and adopted by the Penna. P. U. C. Operating expense items are considered, and non-operating expense items are not considered, for rate making purposes. The Interstate Commerce Commission periodically examines and reviews the books, records and reports of motor carriers subject to its jurisdiction and no change or adjustment was made by it for the year 1951 or for the years prior thereto with respect to the reporting of such fines for weight violations as an operating expense (129a-130a).

Petitioner was organized on January 1, 1945. From 1942 to the latter part of 1950, it was the policy of the Commissioner of Internal Revenue, by letter ruling dated September 10, 1942, to allow fines incurred by motor carriers for violation of the laws relating to maximum weight to be deducted as ordinary and necessary business expenses on the ground they more nearly resembled tolls, allowing the carriers the right to proceed upon the state highways without interference, than as penalties imposed as a punishment for violation of law. By special ruling dated November 30, 1950, the Commissioner reconsidered the matter and concluded that the fines were no longer deductible (Appendix to Pet. Br.).

The Tax Court concluded that although the Pennsylvania violations were widespread and common, and petitioner would have been at a competitive disadvantage in the operation of its business unless it did engage in such practices, nevertheless the Pennsylvania violations were conscious and deliberate, represented a calculated risk taken by petitioner and the other carriers, and the fines paid were criminal penalties for violation of state law. Accordingly, the Tax Court disallowed the Pennsylvania fines as deductible ordinary and necessary business expenses, since the deduction would, in the opinion of the Tax Court, have the effect of mitigating the degree of punishment and of frus-

trating the purpose and effectiveness of the Pennsylvania weight limit (131a-133a). The Court of Appeals affirmed this holding.

*New Jersey.*

Petitioner incurred and paid to New Jersey fines and incidental costs on seven different occasions aggregating $2,830.00 for operating overloaded vehicles on the New Jersey highways. The New Jersey limit was 60,000 pounds. In all cases known to petitioner, at no time did petitioner operate vehicles in the state of New Jersey carrying a weight in excess of the 60,000 pounds prescribed generally for the equipment in that state and this was true for the other carriers in the industry. However, the seven fines were levied under a reciprocity provision of the New Jersey law whereby motor vehicles licensed and registered in Pennsylvania, although carrying a weight less than the 60,000 pounds allowed generally, were in violation of the New Jersey weight limitation law if their weight was in excess of the 45,000 pounds, plus the 5% leeway, allowed by Pennsylvania (119a, 133a).

The interstate operation of the bulk liquid motor vehicles was a common and frequent occurrence in the industry and the widespread practice of filling the tanks to capacity, although not creating a weight in excess of the 60,000 pounds allowed generally by New Jersey law, nevertheless caused petitioner's and the industry vehicles to exceed the Pennsylvania limit on a substantial number of the New Jersey trips (116a, 126a-127a).

The Tax Court concluded that New Jersey, for reasons best known to itself, had undertaken to accommodate its penal provisions to those of Pennsylvania by the reciprocity provision, and made it a criminal offense to operate Pennsylvania vehicles on the New Jersey highways which exceeded the lower Pennsylvania limits. It reasoned that the violations were just as deliberate as the ones occurring in Pennsylvania itself, and the fines and costs were simi-

## INDEX TO PETITION.

larly not deductible (133a). This likewise was the conclusion of the Court of Appeals.

*Other States.*

Petitioner incurred and paid in 1951 twenty-eight fines, including incidental costs, aggregating $1,294.69 in the states of Ohio, Delaware, Maryland and West Virginia. The fines pertained to overweight violations which were neither wilful nor negligent, and this was true of the industry as a whole. By the very nature of the commodity and the equipment, the exact weight could not be always controlled. Temperature changes could produce a variance in weight, residual variations in the same commodity of different refineries produced variances in weight, and a combination of a particular tractor with a particular semi-trailer could, at times, produce an axle weight violation, all of which took place despite any precautions that could fairly be demanded consistent with a practical operation of the business (119a, 122a-123a, 127a).

With respect to the violations in these states, the Tax Court adopted the reasoning of *Hoover Motor Express Co., Inc. v. U. S.*, 135 F. Supp. 818 (D. C. Tenn.) and held that even assuming that petitioner took every precaution that could fairly be demanded of a prudent motor carrier consistent with a practical operation of its business to comply with the weight limitations, nevertheless the weight laws treated the wilful and innocent violator alike, and to allow the income tax deduction for inadvertent and innocent violations would frustrate clearly defined policies of the applicable state weight statutes (134a-135a). Similarly, the Court of Appeals, relying upon the affirmance of the *Hoover Motor Express Co., Inc.* case by the Sixth Circuit (decided 1-4-57), found no justification for distinguishing between the wilful breach and the innocent mistake and concluded that the purpose of the motor vehicle laws would be frustrated just as much in the unintentional case as in the wilful transgression.

## ARGUMENT.

**1. The Decision Below Presents an Appropriate Occasion for This Court to Define in the Field of "Fines" the Application of the So-Called Public Policy Doctrine of Disallowance of Income Tax Deductions for Ordinary and Necessary Business Expenses.**

The Internal Revenue Code itself contains no provision denying the deduction of fines as such and the rules relating to deductibility or non-deductibility have evolved administratively and judicially. Thus, for many years the Commissioner of Internal Revenue himself ruled that the exact type of fines involved in the instant case covering violations by motor vehicle carriers for exceeding the maximum weight laws of the several states were deductible as ordinary and necessary business expenses (App. 26-28). At the judicial level, *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d 711 (C. A. 2) is the forerunner of a series of cases holding that the penalty paid to the Government for innocent violations of the Emergency Price Control Act of 1942 is also entitled to recognition as a legitimate income tax deduction. See *National Brass Works v. Commissioner*, 182 F. 2d 526; 205 F. 2d 104 (C. A. 9).

However, at times Courts of Appeals and the Tax Court have seemed to go so far as to conclude that fines imposed or penalties paid in connection with or to compromise violations of state or federal statutes are, ipso facto, not deductible. *Commissioner v. Longhorn Portland Cement Co.*, 148 2d 276 (C. A. 5); *Helvering v. Superior Wines & Liquors*, 134 F. 2d 373 (C. A. 8); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C. A. 2); *Great Northern Railway Co. v. Commissioner*, 40 F. 2d 322, 372 (C. A. 8); *Bonnie Bros., Inc. v. Commissioner*, 15 B. T. A. 1231. These cases proceed on the theory that to allow fines to be deducted from the

# TABLE OF CASES CITED.

wrongdoer's gross income reduces and so, in part, defeats the prescribed punishment.

This Court has never directly ruled on the point. In *Commissioner v. Heininger*, 320 U. S. 467, and *Lilly v. Commissioner*, 343 U. S. 90, this Court noted that where a taxpayer has violated a federal or state statute and incurred a fine or penalty, lower courts have not permitted him a tax deduction for its payment. No opinion was expressed whether this result should automatically follow, on the theory that the allowance of the deduction of the fine would always frustrate the sharply defined policies of the applicable federal or state statute. The Second Circuit in *Rossman* has concluded from the language of this Court in *Heininger* that such frustration would not automatically follow in every case of a fine (see discussion *infra*); other Courts of Appeals construing the same language in *Heininger* seem to indicate that it does.

The absence of more definitive guides from this Court as to the correct application of the public policy rationale promotes a tendency to sweep every type of fine and penalty into the non-deductible category. For example, the Commissioner of Internal Revenue, after ruling for many years that the fines involved herein were deductible, reversed his position in 1950 without any showing of a change in public policy calling for a different ruling (App. 29).

Public policy as the reason for tax disallowance of an expenditure must have realistic confines. No difficulty arises with the expenditure which in itself is illegal and universally condemned, as the bribe to the public official, which, if allowed income tax recognization as a deduction, would seriously interfere with the governmental enactment condemning such conduct. See *Rugel v. Commissioner*, 127 F. 2d 393 (C. A. 8); compare *Textile Mills Securities Corporation v. Commissioner*, 314 U. S. 326.

On the other hand, if the expenditure is an obligation in the nature of a fine imposed by law, further refinements

## STATUTES CITED.



## RULINGS OF COMMISSIONER OF INTERNAL REVENUE.



## MISCELLANEOUS.

must be established by this Court for the orderly administration of the tax laws. The tax sanction of non-deductibility cannot automatically follow merely because something called a "fine" was imposed, as in the instant case, by state law. Federal tax deductions are not to be subject to the uncontrolled caprice of state legislation. The non-deductibility of the fine can only be justified by identifying it, not with some state whim, but with a sharply defined, i.e. important and rational state policy that warrants the type of social condemnation that is or ought to be implied in the concept of crime. Then the income tax deduction must clearly interfere with the enforcement provisions of this type of state statute which are designed to punish past and to deter future violations.

The Federal courts cannot abdicate, as did the court below (App. 23), this important scrutiny, and cannot accept the state designation of the word "fine" as the sole reason for income tax non-deductibility.

The tax laws are to be interpreted so as to have a uniform application throughout the states of the United States. In the factual situation similar to that presented in the instant case, one state may require a higher license fee and another state the payment of a "fine" for continued uninterrupted operation on the respective highways of motor vehicles bearing the same weight. Under the view of the court below, the payment of the former would be deductible, the latter not. Business necessity having widespread legislative acceptance would thus result in tax discrimination by means of state legislative semantics.

Accordingly, the instant case clearly presents an appropriate occasion for this Court to limit the tax disallowance of the deduction of a fine to realistic public policy levels where the fine is intended to punish and to deter socially condemned activity implicit in the concept of crime, in accordance with the pronouncements of this Court in the *Lilly* and *Heininger* cases.

**2. The Decision Below is in Conflict With the Rationale of the Decisions of This Court in Commissioner v. Heininger, 320 U. S. 467 and of the Second Circuit in Jerry Rossman Corporation v. Commissioner, 175 F. 2d 711, and of the Seventh Circuit in Ross and Sullivan v. Commissioner, — F. 2d — (Decided 2-13-57).**

This Court, in *Heininger*, impliedly denied what was accepted by the court below, that an obligation in the nature of a fine can never be deducted. It did so when it held that the legal expenses of an unsuccessful defense against the fine could, at times, be deducted. Thus, in interpreting this Court's decision in *Heininger*, the Second Circuit said in *Rossman* (p. 713):

> "whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends upon the place or sanctions in the scheme of enforcement of the underlying act. We think that . . . (this) . . . is the right reading (of *Heininger*); in short that there are 'penalties' and 'penalties' and some are deductible and some are not . . . Perhaps the deduction of a fine or forfeiture after an 'administrative finding of guilt' is more likely to 'frustrate the sharply defined policies' of a statute which imposes it, than the deduction of the legal expenses of an unsuccessful defense—though that seems questionable—but certainly there is no more ground for taking as a 'rigid criterion' the imposition of the fine than the incurrence of the expense. Each may 'frustrate the sharply defined policies' of a statute; that will depend upon how one views their deterrent effect. We hold, therefore, that in each case the question must be decided ad hoc."

The fact that the court below found no difference taxwise with the three types of fines involved in the instant case—(1) those consciously required to be incurred in Pennsylvania in order for petitioner to continue to stay in business; (2) those incurred in New Jersey which used the

IN THE

# Supreme Court of the United States.

October Term, 1956.

No.

TANK TRUCK RENTALS, INC.,
*Petitioner*,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent*.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## OPINIONS BELOW.

The opinion of the Tax Court (115a-136a)[1] is reported in 26 T. C. No. 52. The opinion of the Court of Appeals (App. 20-24) is reported in — F. 2d — (decided 3-6-57).

## JURISDICTION.

The judgment of the Court of Appeals was entered on March 6, 1957 (App. 25). The jurisdiction of this Court rests on Section 1254 of the Judicial Code.

1. Record references are to the separate appendix to petitioner's brief in the court below.

lower Pennsylvania weight limitations for petitioner's vehicles, despite the fact the vehicles were within the weight prescribed generally by New Jersey law; and (3) those incurred in the other states where the violations admittedly were innocent and inadvertent—indicates a conviction that the denial of the deduction of any fine, regardless of its non-deterrent or punishment purposes, was required as a matter of law, in conflict with what was set forth in *Heininger*.

Similarly, the attempt by the court below to distinguish *Rossman* on the ground that the legislative history of the price statutes involved in that case indicated a distinction between a wilful breach and an innocent mistake is at best superficial, and points up the direct opposition of viewpoint of the two Circuits. It is not whether the violation from which the fine arose is wilful or innocent that is controlling. It is the role the fine plays in the scheme of enactment and enforcement of the applicable statute. *Rossman* clearly recognizes this, indicating that in each case the question must be decided ad hoc. See *A. L. I., Federal Income Tax Statute*, February 1954 Draft, Vol. I, Section x165 (i). The court below did not, placing undue reliance on *Hoover Motor Express Co., Inc. v. U. S.*, — F. 2d — (C. A. 6, decided 1-14-57), and did not concern itself, as it should, with probing into the punishment and deterrent purposes of the fine in the scheme of enforcement in the three different situations presented in the instant case.

Likewise, no real distinction exists income taxwise between an expenditure declared illegal by some state law and a fine imposed for making this very payment. The decision of the court below thus is in direct conflict with the decisions of the Seventh Circuit in the *Ross* and *Sullivan* cases. There the Seventh Circuit held that salaries and rent paid in direct violation of a state statute penalizing such payments by the proprietor of an illegal bookmaking establishment must be considered an integral part of the illegal business and as such deductible. See *Commissioner*

## QUESTIONS PRESENTED

I. Whether sums paid by petitioner, a bulk liquid motor carrier, pursuant to union contracts with its truck drivers to indemnify them against fines imposed on the drivers for operating on the Pennsylvania highways motor vehicles which exceeded the Pennsylvania weight laws, were deductible as ordinary and necessary business-expenses where:

a. Pennsylvania had lower weight limits than the surrounding states through which petitioner operated;

b. petitioner's standard size vehicles, when fully loaded with liquids other than gasoline, were necessarily always in excess of the Pennsylvania legal limit and subject to fines although they carried a weight permissible in the other states;

c. petitioner had to carry full loads to stay in business; and

d. the fines were required by Pennsylvania law to be used for road and highway maintenance and repair?

II. Were similar fines imposed by the states of New Jersey, Maryland, Ohio, West Virginia, and Delaware directly on the carrier so deductible where:

a. New Jersey, although having a weight limitation considerably higher than that of Pennsylvania, had a reciprocity provision whereby a vehicle registered in Pennsylvania had to comply with the stricter Pennsylvania limits, causing petitioner's Pennsylvania registered vehicles operating in New Jersey to be subject to New Jersey fines when their weight exceeded the lower Pennsylvania limit, even though the weight was under the limit otherwise permissible by New Jersey law; and

b. the weight laws of the other states were sufficient to assure maximum utilization of the standard size equipment and any operation of overloaded vehicles subject to fine was innocent, inadvertent and without petitioner's knowledge at the time of the trip?

## STATUTE INVOLVED.

INTERNAL REVENUE CODE OF 1939.

Sec. 23—Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

## STATEMENT.

This case involves the income tax liability of Tank Truck Rentals, Inc. for the calendar year 1951. The statutory notice of deficiency was dated August 12, 1953. The petition for redetermination was filed in the Tax Court on October 19, 1953 (1a).

The facts found by the Tax Court material to the questions presented are substantially as follows (115a-130a).

### *General History.*

Petitioner was part of the industry engaged in the business of transporting bulk liquids by motor vehicles. Petitioner had no operating certificates of its own issued by the Interstate Commerce Commission or the State Public Utility Commissions, but, as a lessor, leased its motor vehicles and furnished the driver as its own employee to motor carriers holding such certificates, who also owned and operated large fleets of their own (115a).

Petitioner and its industry witnesses, hereinafter sometimes referred to as the industry, represented carriers who transported a substantial portion of the bulk liquids carried over-the-road by all motor carriers in the states of Pennsylvania, New Jersey, Ohio, Maryland, Delaware and West Virginia during the taxable year. Over-the-road means

transportation between towns and cities, but not solely within a municipality. Petitioner and the industry operated inter and intra-state (115a-116a).

Each of the states involved prescribed a maximum weight for motor vehicles using its public highways. Pennsylvania had lower weight limits than the other states. The Pennsylvania limit in 1951 was 45,000 pounds, plus a 5% leeway, or a total of 47,250 pounds. This limit had remained unchanged from as far back as 1943 until it was increased by legislation in 1955. The other states, by 1951, prescribed generally a maximum weight of 60,000 pounds (117a-118a).

Substantially the same equipment was used and operated in the industry generally throughout the states. It consisted of truck tractor and semi-trailer combinations. The bulk of the industry's semi-trailer fleets contained tanks with a capacity ranging from 4,500 to 5,000 gallons. Petitioner was formed in 1945 and during World War II only single compartment tanks within the 4,500 to 5,000 gallon range were available for purchase. This was due to restrictions relating to the conservation of steel, and the attempt to have a uniform standardized size of tank for maximum utility which would comply generally with the weight restrictions in most of the states in the United States (116a-117a, 123a).

The weights of the bulk liquids commonly carried varied from 6 pounds per gallon for gasoline to 8 pounds per gallon for Bunker "C" oil. The equipment was standardized in weight ranging between 20,000 pounds and 22,000 pounds, unloaded. Thus this equipment, when fully loaded with any liquid other than gasoline, was always in excess of the legal limit in Pennsylvania, but generally within the maximum prescribed by the other states whose weight limits assured capacity use of the standard equipment (117a, 120a, 124a, 131a).

## *Pennsylvania.*

It was the common, widespread and long established practice in the industry in Pennsylvania and in the other states to fill the semi-trailer tanks to capacity (118a). Only by operating maximum loads were petitioner and the other carriers able to remain in business. The rate structure in the industry was predicated upon the carriage of 4,500 gallons (47,000 to 58,000 pounds) per trip and petitioner's rental for its equipment and driver was based on a percentage of the tariff received from the customer by its lessee-certificated carriers in the industry. Discontinuance of the practice of filling to capacity would have reduced petitioner's operating revenue per gallon hauled, while operating costs would have increased because of the additional number of trips required, thus causing petitioner to operate at a loss and go out of business. An increase in petitioner's rentals, to compensate for the reduced pay load per trip would have referred the business to the other carriers. Petitioner chose to remain in business and conform to the industry's practice of overloading (37a-38a, 124a-125a).

Aside from the revenue factor, it was not feasible for petitioner or the industry to load the tanks partially in order to conform to the Pennsylvania weight requirements. This would have created a hazard to the safety of operation for the reason that the surge created in the partially filled tank causes difficulty in stopping the motor vehicle and in negotiating curves along the highways (125a).

Acquisition of smaller equipment, although it would have avoided the hazard to public safety of the partially filled tank, would have been just as uneconomical as carrying partial loads. Moreover, in determining industry policy with respect to the size of equipment to be used in Pennsylvania, one of the factors which necessarily had to be considered was the legislation which was proposed from the time of petitioner's formation in 1945 in each successive

session of the Pennsylvania Legislature to increase the weight requirement to conform to that of the neighboring states, which, if enacted as it finally was in 1955, would have rendered the fleet of smaller equipment entirely obsolete (11a, 41a, 125a-126a, 130a, 75 P. S. § 453 (pocket part)).

In addition, although approximately 100% of Petitioner's operations had some contact with the state of Pennsylvania—the transportation taking place either wholly within Pennsylvania or Pennsylvania being the destination or originating state on interstate shipments—nevertheless petitioner was engaged in a substantial amount of interstate business, as were all the other carriers in the industry. It was essential that the equipment owned and operated by petitioner and the other carriers be suitable economically in the neighboring states where they operated, which allowed the larger standardized equipment to be fully utilized. Semi-trailer tanks with a capacity small enough to be fully utilized for purposes of the Pennsylvania weight requirements were virtually worthless to petitioner and the other carriers in their operations in any state other than Pennsylvania (126a).

Furthermore, in Pennsylvania an increase in rates by the industry as a whole to compensate for the loss in revenue per trip for the operation of the smaller equipment would have referred the business to the railroads and to the motor vehicle fleet privately owned and operated by the refineries, the main customers of the over-the-road bulk liquid carriers. In the neighboring states such an increase would have referred the business to competing carriers avoiding Pennsylvania in their operations. Accordingly, petitioner and the other carriers decided to utilize fully their standard equipment in Pennsylvania as well as in the other states, rather than abdicate the business (125a-126a).

Although the Pennsylvania statute contained a provision for granting a one-trip particular load permit to exceed the legal limit for each overweight vehicle, upon

payment of a fee, this procedure did not offer a practical solution to the dilemma in which petitioner and the other carriers found themselves. The fees were not insubstantial and the procedure was cumbersome, with resultant delay to both the shipper and the consignee. This was especially true on interstate operation, when a vehicle was overweight in Pennsylvania as a result of a continuous trip. Moreover, it was doubtful if the permit would have been granted, since it was the policy of the Pennsylvania authorities not to issue the permit where the overweight could be avoided by not filling the tank to capacity. Hence, it was the industry practice, followed ~~by petitioner~~, not to seek the permit and instead to take the risk of incurring a fine (43a-44a, 126a, 131a, 75 P. S. § 455).

As a consequence of the uniform practice to fill the tanks to capacity and operate equipment exceeding the maximum gross weight allowed by Pennsylvania law, the vehicles of petitioner and the other bulk liquid carriers were frequently stopped by the police in 1951 and fined the statutory amount, plus incidental costs, of $25.00 for a vehicle not exceeding 10% of the maximum weight, and $50.00 for a violation over 10%. Petitioner's vehicles were stopped and fined 711 times. The fines imposed amounted to $36,836.15, including costs. Petitioner's vehicles and those of the other carriers were overweight in Pennsylvania a substantial number of times in excess of the number of times they were stopped and fined (119a-120a, 126a-127a).

### *Pennsylvania Public Policy.*

By Pennsylvania law, the fines were imposed on the employee-driver of the overweight vehicles and not, as was the case with the other states, on the carrier-owner. Under union negotiated contracts with its employee-drivers, petitioner was obligated to indemnify the drivers and consequently, did pay the fines for the overweight vehicles. The other carriers did likewise (14a-16a, 128a).

*v. Doyle*, 231 F. 2d 635 (C. A. 7). It is unquestionable that nothing could have been more integral to the petitioner's perfectly legal and legitimate business than to have filled its tanks to capacity with bulk liquid, thus causing its vehicles to be overweight in Pennsylvania and subject to fines on approximately 60% to 75% of its trips. The Tax Court found what the court below accepted, that unless petitioner conformed to this widespread industry practice, it would have been unable to operate in Pennsylvania, would have been prevented from any interstate operations through the neighboring states which recognized the higher weight limits generally prevailing, and would have been forced to go out of business.

If the taxpayers in the *Ross* and *Sullivan* cases properly could deduct the illegal payments of rent and salaries, there is no reason why they could not have deducted a fine imposed for making those payments. However, under the decision of the court below, they would not have been so allowed. This is indeed a peculiar twist. Although gambling itself may be socially condemned and a fine imposed to prevent and punish such activity justifiably may be refused tax deduction, the Seventh Circuit quite properly held that the rent and salary aspects of such an illegal business, recognized as legitimate in most states but treated as unlawful in Illinois where the case arose, cannot be further punished by refusal to recognize the expenditure as an ordinary and necessary business expense, where the income itself admittedly was subject to tax.

So also, in the instant case, the fines in Pennsylvania were imposed on weights recognized as legitimate in all the neighboring states. They were imposed not to punish past nor to deter future overweight violations, since continued operation of the overweight vehicles was completely and freely allowed merely upon payment of the fine. The fines were by statute allocated to road and highway maintenance and repair. See *A. L. I. Federal Income Tax Statute*, February 1954 Draft, ~~Vol.~~ I, Section x165(i)(2), which

proposes that fines or penalties imposed primarily for compensatory damage are deductible. Both the conscious and inadvertent overweight operations were absolutely vital to the continued business existence of the petitioner and the other carriers in the industry, so long as Pennsylvania, prior to 1955, saw fit to maintain lower weight limits than that permissible in all the neighboring states through which petitioner and the industry operated. Hence, the fine was nothing more than a disguised toll for the use of the highways.

That this position is not a novel one is evident from the fact that from 1942 to the latter part of 1950, the Commissioner of Internal Rveenue, by letter ruling, allowed the fines incurred for such overweight violations to be deducted as ordinary and necessary business expenses (Appendix 26-28). No sharply defined state policies were then thought to be frustrated, for the Commissioner took the view that although the payments were designated as fines in the respective statutes, they more nearly resembled tolls, allowing the carrier the right to proceed upon the highways of the state without interference, than as penalties imposed for violations of law. Thus, the place of the fine, especially in the Pennsylvania weight law, being imposed on the employee-driver, and the studied enforcement policy adopted by the Pennsylvania authorities to recognize the discriminatory position the bulk liquid industry found itself in by allowing the vehicles to continue overloaded without requiring that the excess load be removed, indicate that the factual premise upon which the Commissioner's earlier deductible ruling was based continued to be present in Pennsylvania in the taxable year.

Accordingly, the court below misunderstood and improperly applied the pronouncements of this Court in *Heininger* and created by its decision serious conflict with the *Rossman* and with the *Ross* and *Sullivan* decisions.

## CONCLUSION.

The decision below is incorrect. There is conflict with the pronouncements of this Court in *Heininger*, and with the decisions of the Courts of Appeals of other Circuits. The occasion is appropriately presented for the first time for this Court to define the realistic confines of the application to fines of the public policy doctrine denying tax deduction to ordinary and necessary business expenses, in order to aid in the proper administration of the revenue laws. The petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

LEONARD SARNER,
PAUL A. WOLKIN,
*Counsel for Petitioner.*

# Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,060

TANK TRUCK RENTALS, INC.,
*Petitioner,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued January 25, 1957

Before BIGGS, *Chief Judge*, and McLAUGHLIN and HASTIE, *Circuit Judges.*

**Opinion of the Court.**

(Filed March 6, 1957)

By McLAUGHLIN, *Circuit Judge.*

Petitioner during the year 1951 was a motor carrier transporting bulk liquids. It supplied vehicles and driver-operators to various "over-the-road" carriers holding operating certificates from the Interstate Commerce Commission. During 1951, it paid fines totalling $37,965.00 imposed

on its drivers for operating on the highways motor vehicles in violation of state statutes limiting weights of motor vehicles.[1] Most of the fines were paid in Pennsylvania which had a particularly low maximum weight law at that time.[2] The New Jersey fines sought to enforce the Pennsylvania maximum weight provision through reciprocity provisions of the New Jersey statute. The fines paid in states other than Pennsylvania and New Jersey resulted from unintentional overloading.

As a matter of economic policy petitioner deemed it expedient to overload and run the risk of an occasional fine. The Tax Court found that it had been the general practice of the trucking industry to overload in Pennsylvania and chance the fines with the result that petitioner would have

1 The following table shows, with respect to the taxable year involved the number and dollar amounts of fines and costs paid by taxpayer to each of the states involved:

| State | Number of Fines | Dollar Amt of Fines | Dollar Amt of Costs | Total |
|---|---|---|---|---|
| Pennsylvania | | | | |
| at $50. each | 649 | $32,450.00 | $2,709.40 | $35,159.40 |
| at $25. each | 62 | 1,550.00 | 226.75 | 1,776.75 |
| New Jersey | 7 | 2,800.00 | 30.00 | 2,830.00 |
| Maryland | 7 | 410.00 | 29.91 | 439.91 |
| Ohio | 9 | 405.00 | 51.10 | 456.10 |
| West Virginia | 10 | 320.00 | 39.68 | 359.68 |
| Delaware | 2 | 30.00 | 0.00 | 30.00 |
| | 746 | $37,965.00 | $3,095.84 | $41,060.84 |

2 The statutory maximum gross weight for the truck tractor and semi-trailer combination owned, used and operated by taxpayer was, for each of these states in 1951, as follows:

| State | Statutory Citation. | Maximum Gross Weight |
|---|---|---|
| Pennsylvania | 75 P.S. § 453(g) | 45,000 lbs. |
| New Jersey | N.J.S.A. § 39:3-84 | 60,000 lbs. |
| Ohio | Page's Ohio Gen. Code Anno. § 7246 | Statutory formula which results in range from 57,000 to 67,600 lbs. |
| Delaware | Del. Code Anno. Title 21, Chapter 45 § 4503 | 48,000 lbs. for single axle trailers; 60,000 lbs. for tandem axle trailers |
| West Virginia | 1951 Supp. to West Va. Code of 1949 Anno. § 1721 (463) | Statutory formula which results in range from 54,000 to 60,800 lbs. |
| Maryland | Flack's 1951 Anno. Code of Maryland § 278, Art. 66½ | Statutory formula which results in gross weight of 65,000 lbs. |

been at a competitive disadvantage if it had attempted to conform to the law. In 1955, the Pennsylvania maximum load limits were raised substantially.[3]

The rule that certain expenditures otherwise ordinary and necessary under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 are not deductible if their allowance would frustrate sharply defined national and state policies is of judicial origin. Commissioner v. Heininger, 320 U. S. 467 (1943).

In Hoover Motor Express Co. v. United States, 135 F. Supp. 818 (D.C.M.D. Tenn. 1955), affirmed January 4, 1956, 6 Cir., F.2d ; the District Court made an exhaustive examination of the pertinent case law and held overloading fines were not deductible by a motor carrier. Petitioner seeks to distinguish the Hoover opinion on the grounds that: (1) there was a greater disparity in the Pennsylvania weight limitation and those of the adjoining states; (2) the economic factors are more compelling in this instance; and (3) the Pennsylvania enforcement policy was sporadic or discriminatory. These broad allegations add nothing substantial to petitioner's wholly untenable theory. Under it the federal court on a tax controversy would be required to examine not only the merits of particular criminal cases in the state courts, but indeed the wisdom of a state motor vehicle statute and the regularity of its enforcement. State legislatures are the determinative tribunals in those areas. Once it is concluded that the regulation is within the sphere of proper legislative action the courts will not gainsay the legislature on just where the arbitrary line between allowable and proscribed weights should be drawn. Nor is it appropriate at this juncture to review state enforcement policies. Such must be the rule if there is to be any semblance of order on this and similar questions. The weight limit law is not to be considered a mere revenue measure, as petitioner suggests, simply because

3 Act #70 of June 30, 1955, amended the Pennsylvania Vehicle Code, 75 P. S. §§ 453, 454.

the fines collected are assigned to road repair. It has been held by this court that the disputed law is for the protection of the citizenry of Pennsylvania as well as the public roads. See McDonald v. Pennsylvania R. Co., 210 F.2d 524 (3 Cir. 1954) involving a death claim arising in part from disregarding this statute regulating overweight vehicles.

Petitioner seeks to support its theory by Jerry Rossman Corporation v. Commissioner, 175 F.2d 711 (2 Cir. 1949), which allowed deductions of overcharges paid over to the government under the Emergency Price Control Act of 1942. See also National Brass Works v. Commissioner, 182 F.2d 526 (9 Cir. 1950); and National Brass Works v. Commissioner, 205 F.2d 104 (9 Cir. 1953). Those decisions turn on the legislative history of the price control statutes which indicated a distinction between wilful breach and innocent mistake. That distinction does not exist in the governing motor vehicle law now before us, and even if it did petitioner's offenses in Pennsylvania and New Jersey were admittedly wilful. The transgressions in other states, though unintentional, were in disregard of the local laws. Further, the O.P.A. cases rely on the unusually complex regulatory scheme in the price control law, which problem does not confront a motor carrier with respect to weight limit restrictions. The O.P.A. penalty required merely that the unlawful income be paid over to the government. That purpose was not frustrated in a non-wilful case by relieving the taxpayer of the tax burden on the income so disgorged. As Judge Learned Hand wrote in Rossman (p. 713), "We think * * * in short that there are 'penalties' and 'penalties', and that some are deductible and some are not".

We hold it clear that the state statutes involved are as said in Commissioner v. Heininger, supra, the creation of "sharply defined state * * * policies"; that they are "state policies evidenced by some governmental declaration of them". Lilly v. Commissioner, 343 U.S. 90, 97 (1951). The Court that fashioned those phrases could not have had in mind a more typical example than motor vehicle laws.

The decision of the Tax Court will be affirmed.

**Judgment of the Court Below.**

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by Counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
*Clerk.*

March 6, 1957.

**Text of a Letter Dated September 10, 1942, and Signed by Guy T. Helvering, Commissioner (Symbols, IT:P:2—WTL): (1950 CCH—Stand. Fed. Tax Rep. Vol. 5, ¶ 6134).**

Reference is made to your letter of July 29, 1942, requesting advice with respect to the deductibility, for Federal income tax purposes, of "fines" incurred and paid to a State by motor carriers for violation of laws relating to maximum weights and lengths of trucks, consisting of a tractor and semi-trailer operating upon the highways of such State.

The pertinent facts are that the various States have their own laws as to maximum weights and lengths which vary considerably. Under the laws of the State of New York a tractor semi-trailer is allowed to carry 50,800 pounds while under the laws of the State of Tennessee the same equipment is allowed to carry only 30,000 pounds. The following example is set forth in your letter:

> Let us consider a hypothetical case where an operator has two units, each consisting of a tractor and semi-trailer; each unit having an unladen weight of 15,000 pounds. Should the carrier receive cargo weighing 60,000 pounds in State A where the weight limits allow 50,800 pounds, he could place on the one unit 35,800 pounds of cargo, which with the empty vehicle would make a gross weight of 50,800. The other unit could be loaded with 24,200 pounds, which with the empty vehicle would make a gross weight of 39,200 pounds, and be under the weight limits for State A. Should this cargo have to travel through State B with a weight limitation of 45,000 pounds through State C, with a weight limitation of 40,000 pounds to State D, with a weight limitation of 30,000 pounds, there would be two courses open to the carrier. One would be to secure permits for the particular unit which might be over-

weight in accordance with the State law, if such State issued permits. The other would be to load his cargo and take a chance on going through the States and paying a "fine" if caught, as the "fines" in most cases would be about the same as the cost for a permit. In our hypothetical case the heavier of the two units would be overweight in all States except the originating State and lighter of the two could pass through all States except E, the destination point.

You state that the matter of securing permits often forces the operator to take the chance on paying "fines", as it would probably require at least three or four days for a Maryland operator to secure permits in the States referred to above, and this delay might result in several contingencies, such as spoiling of perishable goods or loss of the cargo because of the urgency and need for speed. Should the operator decide on delaying the cargo and abide by all the laws, he could list the cost of permits as ordinary business expense and deduct it in his income tax return, but should he, as a matter of business, to prevent loss and satisfy the shipper and consignee, take his chances with "fines", he would not be permitted to deduct them in his income tax return. The "fines" in the majority of cases are for revenue and no attempt is made to have the excess load removed, which would place the "fines" in the same category as the amount paid for permits.

Amounts paid as penalties for violation of State statutes have been held to be non-deductible for Federal income tax purposes either on the ground that such expenditures were avoidable and therefore are not a necessary incident to the operation of a business or because, on grounds of public policy they ought not to receive any sanction. (See *Burroughs Building Material Company v. Commissioner*, 18 B. T. A. 101, affirmed 47 Fed. (2d) 178, Ct. D. 297, C. B. X-1, 397 (1931) and *Great Northern Railway Company v. Commissioner*, 40 Fed. (2d) 372; see also G. C. M. 11358,

C. B. XII-1, 29 (1953) in which it is held that penalty payments in connection with income taxes, whether on account of negligence, delinquency, or fraud are not deductible from gross income. However, as indicated in the *Burroughs Building Material Company* decision, *supra*, expenditures which are in themselves immoral, such as for bribery of public officials to secure protection of an unlawful business, would not have to be allowed in order consistently to justify a deduction of "fines" paid for violations of law involving no moral turpitude and practically inevitable. The court stated in that decision, in referring to the *Great Northern Railway Company* case, *supra*, that "fines" for violations of regulations, which are inevitable in any large railroad system may, for that reason, reasonably be allowed as "ordinary and necessary" expenses of the business.

Although the amounts paid by the motor carriers are designated as "fines" in the statutes and regulations of the several States, they more nearly resemble a toll allowing the carriers the right to proceed upon the highways of such States without interference than as penalties imposed as a punishment for violations of law. The payment of such "fines" are shown by the facts to be a necessary incident to the operation of the business of such carriers.

It is the opinion of this office that the "fines" incurred and paid by the motor carriers under the circumstances stated above constitute "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" within the meaning of section 23(a) of the Internal Revenue Code and are allowable business expense deductions.

**Special Ruling Dated November 30, 1950 (1951-1 C. B. p. 15).**

Reconsideration has been given to the conclusion heretofore reached by the Bureau that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are deductible from gross income as ordinary and necessary business expenses under Section 23(a)(1)(A) of the Internal Revenue Code.

That conclusion was based upon the understanding that the fines in question were paid in lieu of fees which would have been payable for permits to operate overloaded or overlength vehicles, and that such permits were generally granted by the State highway authorities. The fines were, therefore, regarded as more in the nature of tolls than penalties.

Upon reconsideration of the question involved it appears that the premise on which the Bureau's conclusion was based was erroneous. It is therefore held that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are penalties which are not deductible as ordinary and necessary business expenses under section 23(a)(1)(A) of the Internal Revenue Code. (See *Burroughs Building Material Co. v. Commissioner*, 47 Fed. (2d) 178, Ct. D. 297, C. B. X-1, 397 (1931), and G. C. M. 11358, C. B. XII-1, 29 (1933)).

Pursuant to authority contained in section 3791(b) of the Code, the instant ruling will not be applied to fines incurred or paid prior to December 1, 1950.